

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF MISSISSIPPI  
DELTA DIVISION**

**RUEBEN SMITH, JR.,**

**PLAINTIFF,**

**VS.**

**CIVIL ACTION NO. 2:05CV102-P-B**

**RETZER RESOURCES, INC. d/b/a  
MCDONALD'S and VIGILANT  
INSURANCE COMPANY,**

**DEFENDANT.**

**ORDER**

This matter comes before the court upon Plaintiff's Motion to Remand [5-1]. Upon due consideration of the motion and the responses filed thereto, the court finds as follows, to-wit:

The motion is well-taken and should be denied. Pursuant to 28 U.S.C. § 1446(b), Vigilant had 30 days from receipt of the First Amended Complaint to remove to federal court. That deadline was April 30, 2005. Vigilant did not file their notice of removal until May 25, 2005, some twenty-five days late. As evidenced by the letter between plaintiff counsel and former counsel for Vigilant, the agreement for a 30-day extension was for Vigilant to file an answer. There is no evidence that the plaintiff agreed to waive the 30-day deadline to remove. Thus, the court concludes that the removal was untimely.

In any event, the court concludes that Vigilant has not met its burden in demonstrating that the plaintiff is guilty of fraudulent mis-joinder pursuant to *Tapscott v. MS Dealer Service Corp.*, 77 F.3d 1353, 1360 (11<sup>th</sup> Cir. 1996), *abrogated on other grounds*, *Cohen v. Office Depot, Inc.*, 204 F.3d 1069 (11<sup>th</sup> Cir. 2000). Though the nature of the plaintiff's claims against McDonald's and Vigilant are somewhat different, they both arise from, and are related to, a common nucleus of facts originating with the slip and fall that allegedly occurred at the subject McDonald's.

Thus, the court concludes that this case should be remanded to the state court from whence it came.

**IT IS THEREFORE ORDERED AND ADJUDGED** that:

(1) Plaintiff's Motion to Remand [5-1] is **GRANTED**; therefore,

(2) This case is **REMANDED** to the Circuit Court for the Second Judicial District of Bolivar County, Mississippi.

**SO ORDERED** this the 16<sup>th</sup> day of June, A.D., 2006.

/s/ W. Allen Pepper, Jr.  
W. ALLEN PEPPER, JR.  
UNITED STATES DISTRICT JUDGE